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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 210

THE UNITED STATES OF AMERICA, as owner of the S. S. "CHRISTOPHER GALE,"

Petitioner,

vs.

CHRIS NIELSON, et al., co-partners trading under the firm name and style of DAUNTLESS TOWING LINE, as owner of the Tug "DAUNTLESS No. 6."

BRIEF FOR RESPONDENT NIELSON

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BRIEF FOR RESPONDENT NIELSON

OPINIONS BELOW

The opinion of the District Court (R. 106-108) is reported at 112 F. Supp. 730. The per curiam opinion of the Court of Appeals (R. 115) affirming the opinion of the District Court, is reported at 209 F. 2d 958.

STATEMENT

Respondent adopts the statement of facts set forth in petitioner's brief at pages 3, 4 and 5 but for convenient reference reprints the pilotage clause.

> "When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel assisted in

respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents, or charterers shall be liable for any damage resulting therefrom."

QUESTIONS PRESENTED

1. Whether the language of the pilotage clause permits the respondent, owner of one of the assisting tugs, to recover for damage to his tug caused by the negligence of the docking pilot, a lent servant of the tow.

Under the terms of the pilotage clause involved in this case, the Government specifically agreed that the pilot "becomes the servant of the owners of the vessel assisted" and that "neither those furnishing the tugs . . . or their owners . . . shall be liable for *any damage* resulting therefrom." (Emphasis supplied.)

When the Government itself fixed the rates for towage services with the towboat owners it included the pilotage clause in consideration of the lower rates obtained by inclusion of that clause.

We submit that it is well settled that this form of pilotage clause governed relations between the Government as owner of the *Christopher Gale*, the licensed pilot who was on the ship in charge of her maneuvers, and the tugs which were assisting in the docking operations.

See:

Moran Towing & Transportation Co., Inc. v. *Navigazione Libera Triestina S.A.*, 92 Fed. 2d 37 (C. C. A. 2);

Sun Oil Co. v. *Dalzell Towing Co.*, 287 U. S. 291;

Dalzell v. *The New York*, 77 Fed. Supp. 793;

Mathiasen Towing Co. v. *U. S. A.*, 87 F. Supp. 216.

In the *Mathiasen* case, *supra*, the facts were almost on all fours with those of the instant case, and one of the towing tugs was damaged. Judge KENNEDY points out at page 218:

> "The fallacy underlying respondent's position is that it seeks to apply to a case of liability in rem the principles which would govern personal liability, and *it ignores the effect of the pilotage clause. There was no reservation in the standard pilotage clause in effect at the time of this disaster under which the towage company waived any rights which a third party would have.* And the effect of the pilotage clause is much the same as if, until the completion of the operation, the docking master had been discharged by the tower and had entered the service of the tow." (Emphasis supplied.)

The same clause was under consideration in the case of *Dalzell* v. *The New York, supra.* In the course of the Court's opinion at page 795 it was stated:

> "Nor can any fault, of course, be ascribed to the tug *Lloyd Dalzell.* She was under orders from those in command of the Christian Holm (the steamer which was being assisted). The pilotage clause of the towage contract imposed responsibility on the owner of the vessel which was assisted by the tug. That Romano (the pilot who was on the bridge of the ship) was in the general employ of the libellant cannot relieve the impleaded respondent of liability" (citing cases).

In note 11 at the bottom of page 25 of petitioner's brief it is stated

> "In none of the cases (including the instant case) is there any evidence that the patrons of tugboat companies were offered an option to purchase towage service without acceptance of an exculpatory provision."

Nor is there any evidence that the United States in making its towage contracts asked for a contract from

which the pilotage clause was to be deleted. It continuously operated under the pilotage clause and admits at page 28 of its brief

> "In the performance of joint tug-tow operations, the tug and the tug's personnel are highly vulnerable in the event of mishap. This furnishes a measure of assurance that exculpation from liability of tug to tow would not be an open invitation to carelessness."

Petitioner separates from the pilotage clause, which it quotes at page 30 of its brief, the last phrase "Neither those furnishing the tugs . . . their owners . . . shall be liable for any damage", and contends that the intention of the parties was only to shield the towing company from any possible liability to others. Petitioner has produced no evidence of any kind to show that the parties had such intention in mind when the agreement was made. Petitioner has not cited any authority which would support such a strained and narrow construction, and such a construction not only does violence to the terms of the agreement itself, but gives no consideration whatever to the decided cases on this pilotage clause.

Petitioner's repeated references to pilot Nielson as the "general servant" and "general employee" of the towing company cannot overcome the fact that the agreement clearly states that "it is understood and agreed that such tugboat captain or licensed pilot becomes the servant of the owner of the vessel assisted." This is what the parties agreed to and this is what the court below found (Conclusion of Law 1, R. 109). The parties having agreed that the pilot was to be the servant of the ship owner, the ship is responsible for his negligent acts. There is no reservation in this pilotage clause whereby the towing company waived its rights to sue the ship for the negligent acts of the ship owner's servants.

In *The Margaret A. Moran*, 57 F. 2d 1943 (C. C. A. 2),

this Court passed on this phase of legal relationship between ship and towing company when tugs are supplied to assist in the docking of the ship under a "Pilotage Clause", identical with the clause in the contract between petitioner and respondent herein, in the following words: "By reason of the terms of the pilotage clause, when the master of the *Moran* navigated the steam vessel under her own propelling power, he became the servant of the owner of the vessel with respect to giving orders to any of the tugs engaged in the towage service and with respect to handling the vessel, and the tugs were thereupon released from faults or acts of negligence of the master of the *Moran*" (p. 144).

In *Moran Towing & T. Co.* v. *Navigazione Libera Triestina, S.A.*, 92 F. 2d 37 (C. C. A. 2) the Court used the following language in describing the legal effect of the pilotage clause: "In the present case N. L. T., by agreeing with Moran that the tugmaster should become its servant, in effect undertook to perform a maritime service and to indemnify Moran for *any damage sustained* by the tugmaster's negligence" (p. 38); "to indemnify is to make good a loss," *The Captaine Faure*, 10 F. 2d 950, 954, 2 C. C. A.

Petitioner citing *The Toledo*, 122 F. 2d 255 (C. C. A. 2) attempts to argue that the pilotage clause indemnity provisions cannot come into effect until Dauntless is held actually liable for the negligence of Nielson (Petitioner's Brief, p. 31). In the *Toledo* case the Court refused to enforce the indemnity provision of the charter against the ship owner because it found that the charterer, who had settled the claim, was a volunteer and could not have been legally required to pay the claim.

It is therefore abundantly clear that the interpretation put on the pilotage clause by the District Court Judge is amply supported by decisions in the Supreme Court and in the Court of Appeals, and petitioner must be presumed